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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

BRIEF OF FLOYD R. HOFFMAN, DIRECTOR OF THE OFFICE OF MILK INDUSTRY, DEPARTMENT OF AGRICULTURE OF THE STATE OF NEW JERSEY, *AMICUS CURIAE*

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Statement of the Case

(This supplements the Statement in the Government's brief.)

The Director of the Office of Milk Industry of the State of New Jersey and The State of New Jersey have three grounds of interest in this case.

The first is their responsibility for the economic well-being of the members of the milk industry in New Jersey. In July 1961 2,488 producers in New Jersey sold milk to 74 handlers licensed as dealers by New Jersey and regulated

by Order 27. The July 1961 production of New Jersey producers who shipped milk to New Jersey handlers regulated by Order 27 was 78,183,358 pounds. Approximately 106,000 cows in New Jersey in July 1961 produced milk which was shipped to New Jersey handlers regulated by Order 27. Other cows and producers in New Jersey are engaged in the production of milk sold to out of state handlers also subject to regulation by Order 27. The compensatory payment provisions of Order 27 help to assure to the members of the New Jersey milk industry the enjoyment of their fair share of the higher fluid use value.

The second ground of interest is to assure an adequate supply of wholesome milk to the consumers in New Jersey. The compensatory payment provisions of Order 27 afford protection against an unfair burden of disposition of surplus milk to all members of the milk industry supplying the New York Marketing Area which includes northern New Jersey. In the New Jersey portion of the area resides a very large proportion of the total population of the State of New Jersey. Since consumption in this area greatly exceeds production in this area, the area depends for its supply not only on New Jersey producers, but on other members of the milk industry in the New York milkshed. Therefore, the wellbeing of all the members of the industry in the milkshed is essential to assure an adequate supply of wholsome milk to the consumers in northern New Jersey.

The third ground of interest of the Director of the Office of Milk Industry of New Jersey and of the State of New Jersey in this case is that Order 27, the order of the United States Secretary of Agriculture that is under attack, is concurrent with an order of the Director of the Office of Milk Industry of New Jersey. Both of these orders, and a concurrent order of the Commissioner of Markets of the State of New York are jointly administered by a single

market administrator. The history and validity of the federal and state legislation providing for this concurrent regulation will be discussed in the succeeding paragraphs of this Statement. Since this discussion brings out the purpose of the federal legislation authorizing the market order under attack, it is significant to a determination of the merits of the case.

In 1933 depressed economic conditions created a situation in the milk industry that threatened not only the well-being of the producers of milk but was so serious that it threatened the adequacy of the supply to the consuming public of this necessary and inexpensive food. N.Y.L. 1933 c. 158 §1, adding §300 to the Agriculture and Markets Law; N.J.L. 1933 c. 169, Preamble. The physical and economic facts peculiar to the milk industry in the New York metropolitan area have been frequently discussed by this court. See for example *United States* v. *Rock Royal Co-op*, 307 U. S. 533 (1939); *Nebbia* v. *New York*, 291 U. S. 502 (1934). They may be summarized as follows. Because milk intended for use in beverage form ("fluid milk") is highly perishable, fluid milk originating in the relatively higher cost area of the New York milkshed is not in competition with milk originating from lower cost areas in other parts of the United States. Handlers supplying the New York Marketing Area have historically been able to obtain from the consumer of fluid milk a price which reflects the cost of its production plus a fair return. However, the production of milk in the New York milkshed has always shown a great annual cyclic variation even though the consumption is relatively stable. The excess of the supply of milk over the amount needed to meet a demand for fluid milk is referred to as "surplus." The cyclic variation of supply results in a great seasonal surplus in the late spring. In addition, a lesser, more constant surplus results from the need of handlers to have immediately available sufficient

supplies of packaged fluid milk to meet the daily demand of consumers which to some extent varies unpredictably from day to day.

Handlers must dispose of surplus milk by manufacture into by-products such as butter, cheese and dry ("powdered") milk. Because these by-products are much less perishable than fluid milk, there is a national market for them. The price obtainable for milk by-products manufactured from milk produced in the New York milkshed is depressed by competition with by-products manufactured from milk produced in lower cost areas throughout the United States. Thus, the economic burden of handling surplus milk produced in the New York milkshed is substantial. Prior to regulation, this fact generated great pressure on all members of the industry to increase their fluid utilization of milk. The producer was tempted to seek a price for his milk that was less than its fluid value but more than the "blended" value of fluid and manufactured uses. A handler with a fluid utilization higher than average could afford to pay such a price. But this disproportionately shifted the economic burden of disposition of surplus milk to other handlers and made it difficult or impossible for them to pay their producers even a blended price. Some handlers respond by desperately cutting resale prices to attract a larger share of the fluid market.

This left them still less able to pay producers a fair return and induced destructive price cutting at all levels throughout the industry. The situation became so oppressive to many producers that they threatened to, and in some cases actually did, withhold milk altogether from the market to enforce their demands for a fair and stable price. See *United States* v. *Rock Royal Cooperative, supra,* at 550; Joint Legislative Committee to Investigate the Milk Industry, Report, N. Y. Legis. Doc. 81 (1937).

It was natural for government to respond to such an emergency by the adoption of milk control laws. The first were state laws. The first in the northeastern part of the country was adopted by New York. N.Y.L. 1933 c. 158. Almost immediately New Jersey adopted a very similar act. N.J.L. 1933 c. 169. These acts established administrative agencies with power to fix the minimum prices payable to producers. They did not provide for pooling milk in the entire market area. Thus the temptation to handlers to cut resale prices in order to attract a larger share of the fluid market and to unburden themselves of surplus production of their regular producers would without more subsist. (Such handlers would have to supplement their supply during short seasons by purchases from other handlers or from producers other than their regular producers.) Therefore, the scope of the state regulatory acts was not limited to control of prices payable to producers. Primarily for this reason, to assure equitable sharing of the burden of surplus among all producers needed to supply the market, both the New York and New Jersey acts authorized their administrative agencies to fix resale prices of milk. N.Y.L. 1933 c. 158, Art. XXV Sec. 312(b); N.J.L. 1933 c. 169, Art. VII Sec. 1(a). Other reasons making necessary the fixing of resale prices include:

> "To meet the demands of distributors that their margins be protected so that they can pay the required minimum prices to producers and still remain in business.
>
> • • •
>
> To insure against price manipulation by certain types of distributors for the purpose of strengthening their competitive position in a market at the expense of other dealers.
>
> To check or eliminate the granting of unfair price concessions by milk dealers to chain stores and other

customers that happen to have exceptional bargaining power. The belief is widely held that such concessions often have been greater than the economies of services warranted, with the result that the favored customers were subsidized at the expense of others.

To bring the determination of retail and wholesale prices into the open and to substitute democratic procedure for secret understandings or agreements among distributors. The latter, though illegal, can be avoided only with great difficulty when the determination of resale prices of milk is left in private hands."

Spencer and Christensen, Milk Control Programs of the Northeastern States Part 1 (*Bulletin* 908 *November* 1954 *Cornell University Agricultural Experiment Station, Ithaca New York*) 84 (1954). That Congress has not preempted the entire field of milk price control has been held in *In re E. J. McGovern Dairy Products, Inc.*, 60 N. J. Super. 163 (App. Div. 1959), affirmed 31 N. J. 601 (1960).

The state acts forbade persons to operate as handlers (denominated "dealers" in the state acts) without first obtaining licenses. N. Y. L. 1933 c. 158, Art. XXV Sec. 308; N. J. L. 1933 c. 169, Art. V Sec. 1. These licenses were revokable not only for violation of price-fixing orders, but for a number of other reasons including rejection without reasonable cause of milk purchased from a producer, failure to account to a producer for any milk purchased, failure to keep proper records or furnish required information, continuation in a course of dealing of such a nature as to deceive or defraud customers, producers or consumers, continuation in a course of dealing of such a nature as to demonstrate an inability or unwillingness properly to conduct a milk business, and for any other act likely to undermine health standards or injurious to the public welfare or to trade or commerce or which might demoralize the price structure or interfere with an ample supply of milk for the inhabitants of the state.

The state acts also granted their administrative agencies regulatory power in the broadest terms which might be necessary to prevent the demoralization of the agricultural interests of the state. N. Y. L. 1933 c. 158, Art. XXV Sec. 303; N. J. L. 1933 c. 169, Art. III.

The sponsors of the state acts thought that it would be constitutionally possible to outlaw the sale within either state of milk which had been bought in another state from producers at a price below the minimum which the importing state's law required to be paid to its own producers for their milk according to its use value. Art. XXV Sec. 312(g) of the New York act, L. 1933 c. 158, reads in part as follows:

> "It is the intent of the Legislature that the instant, whenever that may be, that the handling within the State, by a milk dealer, of milk produced outside of the State, becomes a subject of regulation by the State, in the exercise of its police powers, the restrictions set forth in this act respecting such milk so produced shall apply and the powers conferred by this act on the board shall attach. After any such milk so produced shall have come to rest within the State, any sale, within the State, by a licensed milk dealer or a milk dealer required by this act to be licensed, of any such milk purchased from the producer at a price lower within this State than that required to be paid for milk produced within the State, purchased under similar circumstances, shall be unlawful * * *".

Art. VII Sec. 1(c) of the New Jersey act, L. 1933 c. 169, was practically identical.

Although the state acts were held basically constitutional, *Nebbia* v. *New York*, 219 U. S. 50, 54 S. Ct. 505, 78 L. Ed. 940 (1934) (upholding the New York act), and *State Board of Milk Control* v. *Newark Milk Co.*, 118 N. J. Eq. 504 (E.

& A. 1935) (upholding the New Jersey act), this court held in 1935 that the state acts, insofar as they attempted to reach across a state line to fix the price paid to a producer in another state even for milk to be shipped to and consumed in the first state, violated the commerce clause, *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U. S. 511 (1935). This resulted in the introduction into the Market Area of otherwise surplus milk from other nearby states in competition for the fluid sales in the Market Area and a rejuvenation of much of the general instability and economic hardship to producers in New York and New Jersey as had prevailed before the adoption of the state acts. This development militated against realization of the goals of the state acts. However, it did not defeat them altogether. This is evident from the fact that New Jersey continued to regulate prices payable to producers for milk produced in New Jersey and continued to fix resale prices for milk sold in New Jersey and to require licensing of handlers for more than 20 years after the *Seelig* decision.

In 1935, the Legislature passed a second Milk Control Act, N. J. Laws 1935, ch. 175, extending the original which was about to expire. This act, in turn, was extended and amended by N. J. Laws 1937, ch. 56 which was supplanted by another Milk Control Act in 1939, N. J. Laws 1939, ch. 82. Chapter 274 of the Laws of 1941 was the last and current enactment on this subject. N.J.S.A. 4:12A-1 *et seq.* This statute, together with the Department of Agriculture Act of 1948, N. J. Laws 1948, ch. 447, N.J.S.A. 4:1-24 through 41, which continued and transferred milk control functions to the Office of Milk Industry within the Department of Agriculture, constitutes New Jersey statutory law on this subject.

The preamble of the current statute illustrates the problem faced by State legislators and reveals the objective of the enactment. We set it out at length:

"Whereas, it is found and declared that an emergency exists affecting the milk industry in this State; in the interest of the health and welfare of the citizens of this State, it is necessary to continue control of the milk industry in this State; that this act is an emergency law, necessary for the immediate preservation of the public peace, to preserve, protect and promote the public welfare, health and safety, and enacted in the exercise of the police power reserved to the States to protect the citizens of this State in such respect; that it is made necessary by the conditions of unfair, unjust, destructive and demoralizing practices, heretofore existing or threatened, and presently threatening, in the production, sale and distribution of milk which are likely to result in the demoralization of the agricultural interests of this State engaged in the production of milk and the creation of conditions inimical to the health of the public of this State; that it is the policy and intent of this act to prevent these unfair, unjust, destructive and demoralizing practices by providing a reasonable return for the milk producer, so as to prevent possible curtailment of a sufficient supply of fresh, wholesome, sanitary milk for our citizens; and that it is necessary in order to assure an adequate supply of fresh, wholesome, sanitary milk and to protect the public health and welfare, to treat the production, sale and distribution of milk as a business affecting the public health and affected with a public interest; and that the period of public necessity for the regulation of the milk industry by the Milk Control Board (now the Office of Milk Industry) and the Director as herein set forth, during which this act shall be effective shall be until such date as the Legislature may designate to be the termination thereof * * *." N. J. Laws 1941, ch. 274, pp. 713-714.

Even after *Baldwin* v. *Seelig*, state producer price fixing remained at least partially effective. To the extent that it did the power to fix resale prices remained necessary.

Congress filled the gap in the extensive regulation of the milk business undertaken by the states which became apparent in the decision in the *Seelig* case by authorizing federal regulation of minimum prices payable to producers of milk in or affecting interstate commerce. On August 24, 1935 extensive amendments to the Agricultural Adjustment Act became effective. 49 Stat. 750. These amendments gave the federal Secretary of Agriculture power to issue orders concerning the marketing of milk which might embrace one or more of certain enumerated conditions, but no others. 49 Stat. 754, providing for a new section 8c(5)(A) of the Agricultural Adjustment Act, surviving as 7 U.S.C.A. 608c(5)(A). The enumerated conditions included the fixing of minimum prices payable to producers, but did not include any control over resale prices nor any provision for licensing. In another section providing for terms which the Secretary might include in marketing orders for agricultural commodities generally the Secretary was expressly denied power to fix resale prices for milk sold for consumption in fluid form. 49 Stat. 756, providing for a new section 8c(7)(B) to the Agricultural Adjustment Act, surviving as 7 U.S.C.A. 608c(7)(B).

Section 8(3) of the Agricultural Adjustment Act as passed in 1933 had granted the Secretary power to enter marketing agreements with handlers and producers of milk and to issue licenses to them to eliminate unfair trade practices. 48 Stat. 34. These licensing provisions were repealed by section 5 of the 1935 act. 49 Stat. 753.

Thus, Congress authorized the Secretary to exercise the one power constitutionally denied to the states in their extensive regulation of the milk business, the power to fix prices payable to producers for milk in or affecting inter-

state commerce. It expressly withheld from the Secretary power to fix resale prices of fluid milk. It repealed authority for federal licensing which might have seemed inconsistent with state licensing programs. If Congress had done nothing more, it would seem clear that it meant merely to supplement state regulatory power and not to supersede it. However, it went further than that and expressly directed the Secretary of Agriculture, whenever requested to do so by state authorities, to enter into a joint regulatory program with state authorities to insure uniformity in the formulation, administration and enforcement of federal and state programs. To this end it expressly authorized the Secretary of Agriculture "to issue orders * * * complementary to orders or other regulations issued by such [state] authorities * * *". This was done by section 18 of the 1935 amendatory act inserting a new subsection 10(i) in the Agricultural Adjustment Act, 49 Stat. 767. The new subsection read as follows:

> "(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture; Provided, That in-

formation furnished to the Secretary of Agriculture pursuant to section 8d(1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d(2) hereof."

This section survives as 7 U.S.C.A. 610(i).

The Committee on Agriculture had previously recommended a narrower grant of power to the Secretary. It recommended that the Secretary be authorized to confer with and hold joint hearings with state authorities, to avail himself of their services, records and facilities, and in other ways to cooperate with them. 74th Cong., H. Rep. 952 at 18. However, the subsection recommended by the committee itself stated that the purpose of the grant of power was "to promote uniformity in the formulation, administration and enforcement of federal and state programs * * *". *Id.* Since Congress went on to provide in the act as finally passed an express grant of power to the Secretary to issue orders complementary to those of the state authorities in order to provide uniformity of enforcement, it seems the unmistakable intent of Congress that the federal program was not to wholly supersede state power. It intended that state power even over prices payable to producers should subsist to the extent that regulation of interstate sales by producers which did not affect interstate commerce were beyond the power of Congress and reserved to the states. This is made clear by a consideration of the report of the Committee on Agriculture on the Agricultural Marketing Agreement Act of 1937 which reenacted all of the provisions of the Agricultural Adjustment Act discussed above. 75th Cong., H. Rep. 468. It discussed the grant of power

to the Secretary to fix "producer prices for interstate milk" and state regulation almost in the same breath without in any way implying that the state power was to be superseded:

> "* * * Milk is the only commodity for which producer prices for interstate milk may be fixed by the Secretary of Agriculture through orders under the Agricultural Adjustment Act. The necessity for price regulation in the case of milk has also been recognized by many States which have established milk boards to fix producer prices for intrastate milk, and the validity of such State regulation has been upheld by the Supreme Court (Nebbia v. New York (1934) 291 U. S. 502)." *Id.* at 3.

The continuation of limited state power over producer prices by concurrent orders was intended by Congress to achieve its own goal of fair distribution of the burden of surplus milk among all producers supplying a particular market.

The climate of constitutional law was much different in 1935 than immediately thereafter.

Congress could not anticipate the scope which the Supreme Court was soon to give to the commerce clause. Congress was not even certain of its power "to regulate the prices payable for milk sold in interstate commerce." The following quotation from the same committee report quoted in part above is illustrative:

> "REASONS FOR REENACTING THE MARKETING AGREEMENT AND ORDER PROVISIONS
>
> "The Supreme Court in United States v. Butler (1936), 297 U. S. 1, declared invalid the provisions of the Agricultural Adjustment Act authorizing production adjustment programs involving processing taxes

and benefit payments. The question as to whether Congress has the constitutional power to regulate interstate and foreign commerce in agricultural commodities through marketing agreements and orders as provided in the Agricultural Adjustment Act was not before the court and has not yet been determined by the court. Lower Federal court decisions have differed on the question, and in two cases courts have held that the marketing agreement and order provisions were inseparable from the production adjustment provisions which fell in the Butler case. As a consequence of these decisions, doubt has been cast on the validity of all the agreements and orders, and producers of milk, particularly in New England, are now suffering from a seriously demoralized price situation.

"The committee is of the opinion that Congress has the power to regulate interstate and foreign commerce in agricultural commodities in the manner provided in the act, and that an examination of the text and organization of the act and of its history shows these provisions are and were intended to be effective independently of the production adjustment provisions. The committee believes that this view will find the support of the Supreme Court.

"Whatever may be the case, in order that whatever decision which may ultimately be rendered with respect to these provisions may turn on their constitutional validity rather than on their separability, and in order that express authority be given to enter into new agreements and orders in the areas in which they are necessary, it is highly desirable that these provisions be reenacted."

For an example of this Court's ultimate broad interpretation of the commerce clause as applied to milk control, see *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 62 S. Ct. 523, 86 L. Ed. 726 (1942). In 1935 complementary federal and state orders seemed to be the only way of assuring fair distribution of the burden of surplus milk.

The most famous exercise of the power of the Secretary to enter complementary federal-state orders was the issuance of the original Order 27 effective September 1, 1938, providing for pooling of the use values of all milk produced in the milk shed and payment of a uniform price to all producers. 3 Fed. Reg. 2100. New York State authorities issued a concurrent order in terms identical to the federal order, known as Order 126. See *United States* v. *Rock Royal Cooperative, Inc., supra*, at 539. That order did not embrace any part of New Jersey in the defined market area. The New York order was adopted pursuant to a memorandum of principles of cooperation entered by the federal Secretary of Agriculture and the New York Commissioner of Agriculture and Markets dated August 26, 1938. This memorandum recited that it embodied the policies of cooperation in section 10(i) of the Agricultural Adjustment Act as amended and reenacted by the Agricultural Marketing Agreement Act of 1937 discussed and quoted above. In it the Secretary and the Commissioner agreed to establish uniform provisions for the classification and pricing of milk. They agreed to act jointly in the formulation and issuance of concurrent orders. They agreed to establish a single agency for the administration of their complementary orders. The authority for the New York Commissioner to enter the agreement was contained in section 258-n of the Agriculture and Markets Act, enacted by N.Y.L. 1937, c. 383 which reads as follows:

> "The commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States with respect to a uniform milk control with states and/or as between states, and with the federal government in its control of prices of milk handled in interstate commerce, and may exercise his powers hereunder to effect such uniform milk control. He may join with such other authorities federal and state in conducting joint investigations, holding joint hearings and issue joint or concurrent orders, or orders supplementary to those of the federal government, and shall have the power to employ or designate a joint agent or joint agencies to carry out and enforce such joint, concurrent or supplementary orders."

This regulation of the New York milk marketing area continued without substantial change from 1938 until August 1, 1957 when it was expanded to include the 13 northern counties of New Jersey in the marketing area.

The New York marketing order is both one of the oldest and most extensive exercise of the powers granted to the Secretary of Agriculture by Congress. The Secretary has clearly and notoriously interpreted the law as authorizing him to exercise the power conferred on him concurrently with subsisting state power. If this interpretation by the administrative official charged with responsibility for executing the act had been erroneous, Congress would not have let more than 20 years pass without making clear its intent by some amendment of the law. *Cf. Lane* v. *Holderman*, 23 N. J. 304, 322 (1957).

A steady deterioration in north Jersey milk markets occurred in the years following World War II. It was characterized by importation of increasing quantities of unregulated milk. This milk could be purchased at levels below those imposed by the State of New Jersey on intra-

state milk. As a natural consequence, more and more New Jersey handlers utilized out-of-state sources for their Class I (fluid) requirements with a resultant reduction in the fluid utilization of New Jersey milk and a depression of the prices payable to New Jersey producers whose milk was increasingly devoted to surplus uses. Once again, milk strikes developed.

With an example of Federal-State cooperation at its doorstep (Federal Order 27 and New York Order #126), New Jersey started to consider joint regulation in the early 1950's. Initially a separate joint order, distinct from Order 27, was contemplated.

In anticipation of coordinated Federal-State regulation, a "Memorandum of Agreement", was completed on June 30, 1955. The document was signed by Earl L. Butz, Assistant Secretary of Agriculture, and Floyd R. Hoffman, Director of the Office of Milk Industry, State of New Jersey. The Director's authority for executing this document is found in section 25 of N. J. Laws 1941, ch. 274, N.J.S.A. 4:12A-25:

> "For the furtherance of the objects stated in this act *the director shall have authority to enter into agreements with* state, county and municipal agencies and with other states and *the federal government.*" (Emphasis supplied.)

This provision was first enacted effective June 1, 1935. N. J. L. 1935, c. 175, §§307 and 903.

Section I of the memorandum provides:

> "The Secretary of Agriculture and the Director of the Office of Milk Industry shall work together in matters pertaining to the regulation, as provided in the federal act, of the procurement of milk by handlers and milk dealers who market or in any manner participate in the procurement, processing, or distribu-

tion of milk produced to be marketed in such marketing area or areas as shall be defined in such order or orders. Such collaboration is deemed to include but is not limited to: preliminary investigation, arrangement for and conduct of public rulemaking proceedings in the manner, and to the extent permitted under the Federal act, Rules and Regulations issued thereunder and the Administrative Procedure Act, appraisal of record evidence, consultation in an effort to reach agreement on all essential provisions supported by evidence in the record, prior to the issuance of any complementary or concurrent order or an amendment thereto."

The agreement is set out at length in Appendix A.

After publication of the required notice (O. M. I. notices relating to the original hearing and the hearing preceding the September 1, 1958 amendment, will be found in Appendix B, p. 20), public hearings were conducted by representatives of the Federal Department of Agriculture, State of New Jersey and State of New York. The hearings commenced on June 18, 1956 and continued for 102 working days. The last hearing was held on March 29, 1957. Over fifteen thousand pages of transcript and 222 exhibits were presented.

The Director of the Office of Milk Industry, thereafter, issued official Order #57.3, effective August 1, 1957. Federal Order #27 and New York Order #126 were amended, effective the same date. Each of the orders is identical in all major respects. (Pertinent parts of Official Order #57.3 will be found in Appendix C, p. 23.) One of the significant changes in the regulatory program was the inclusion of northern New Jersey in the marketing area. The following counties which comprise New Jersey Milk Marketing Area No. 1 were added: Bergen; Essex; Hudson; Hunterdon; Middlesex; Monmouth; Morris; Ocean (except the

boroughs of Barnegat Light, Beach Haven, Harvey Cedars, Shipbottom, Surf City, Tuckerton, and the townships of Eagleswood, Lacey, Little Egg Harbor, Long Beach, Ocean, Stafford and Union); Passaic; Somerset; Sussex; Union; and Warren.

On August 1, 1957, the Director of the Office of Milk Industry designated the Market Administrator of both Federal Order 27 and New York Order 126, Charles J. Blanford, as his agent to administer official Order #57.3 in marketing area #1 (the New Jersey territory within Order 27). Provision was made for his salary, and Mr. Blanford was required to furnish the Director with a surety bond.

After notice and hearing, section 927.29(d) of the concurrent and complementary orders was amended effective September 1, 1958. Under the original language of the section, the handler made a monthly choice between full and partial regulation. As the section now stands, the handler, absent a monthly election to be partially regulated, is fully regulated.

The period since joint regulation of the northern New Jersey area began has seen a restoration of order to the market. These stabilized marketing conditions are the direct result of the application of the jointly administered market-pool program to an area protected by compensatory payment provisions from the pirating of the fluid market by handlers and producers unwilling to share the burden of surplus production of producers needed to supply the market year round. Outlawing of the compensatory payment provision will again subject the marketing area to an influx of unregulated surplus milk and bring about a renewal of these recently averted chaotic conditions with consequential dangers to the necessary supply of milk for New Jersey citizens.

ARGUMENT

POINT I

The provision in Section 927.83 of Order 27 establishing the *quantum* of compensatory payment as the difference between the use values for fluid and manufactured milk carries out the intent of Congress.

It has been developed in the Statement of the Case that the problem which prompted Congress to enact the legislation authorizing Order 27 and similar milk marketing orders was the chaos resulting from attempts by handlers and producers to win a share of the New York fluid milk market without bearing a proportionate share of the burden of disposition of the surplus milk of producers needed to supply the year round demands of the market area. It is well settled that statutes should be interpreted to achieve the Congressional purpose. The secretary has found on the record that the only way under the circumstances existing in the New York market to prevent certain handlers and producers from defeating the intent of Congress by winning a share of the fluid market without undertaking the burden of surplus is to require compensatory payments of non-pool handlers measured by the difference between use values of fluid and surplus milk.

It is true that the compensatory payment provisions of Order 27 impose a different net result on pool handlers and non-pool handlers. However, this difference in treatment is justified even under the uniformity provisions of §608c(5)(A). It is submitted that the uniformity provisions were adopted to prevent discrimination based on geographic location, to prevent the secretary from setting up a federal region in which discrimination might be practiced against outsiders in a way that states were forbidden to discriminate against outsiders by the Commerce

Clause. But the different treatment of pool and non-pool handlers under the compensatory payment provisions is not based on geographic location but on the handler's function in servicing the market. If a handler seeks to meet the fluid needs of the market and bears a proportionate share of the burden of disposition of surplus milk of producers needed to serve the fluid market year round, he is treated one way. If a handler seeks to service part of the fluid market but is unwilling to bear a proportionate share of the disposition of surplus, he is treated in a different way.

This *amicus curiae* agrees with the contention made by the government that the uniformity provisions apply only to pool handlers. However, it is submitted that even if the court does not so hold, this provision should be construed to permit different treatment based on different function in servicing the market area where such different treatment is necessary to carry out the intention of Congress and is supported by the record, just as differentials in Order 27 have been upheld.

POINT II

The uniformity provision of Section 608c (5)(A) must be construed in relation to the provisions of Section 610(i) authorizing the Secretary of Agriculture to cooperate with State authorities.

In construing the uniformity requirement of Section 608c (5)(A) and determining whether the payments in question come within the coverage of that section, a study of Section 610(i) is helpful. It should be borne in mind that the latter Section was designed to meet a specific need. State regulation of peripheral handlers had been nullified by the *Baldwin* v. *Seelig* decision. Thereafter, no state acting alone could impose a completely effective milk con-

trol program because unregulated out-of-state supplies had disruptive effects upon the intrastate plan. This was the problem and only federal action, either by supersedure or cooperative effort, could apply controls on a regional basis and make them truly efficacious.

The conclusion that vigorous and wholehearted Federal-State cooperation was sought is apparent from a reading of Section 610(i):

> "The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title and in order to obtain uniformity in the formulation, administration and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: * * *"

Mr. Justice BLACK's comments on this section in his dissenting opinion in *Hood* v. *DuMond*, 336 U. S. 525, 560 (1949) are apt.

> "In the foregoing provisions Congress manifested its purpose to subject the milk industry to two cooperating authorities: (1) state legislatures and their se-

lected administrative authorities, and (2) the Secretary of Agriculture. Congress did far more than direct a formal, polite cooperation betwen New York and the Secretary of Agriculture. Recognizing the compelling necessity for a state-federal integrated regulatory system for the milk industry, Congress was careful to leave the door open for the Secretary of Agriculture and state authorities working together to formulate mutually complementary orders in the field. These complementary state-federal laws and orders were to be aimed at precisely the same evils believed to have been generated by chaotic competitive conditions in the milk industry. The objective of both laws was to help impoverished farmers."

It is submitted that Section 608c(5)(A), in light of the above problem and congressional approach, should not be subject to an unnecessarily restrictive construction. The interpretation of the uniformity provision of Section 608c (5)(A) reached in *Kass* v. *Brannan*, 196 F. 2d 791 (C. A. 2, 1952), cert. denied, 344 U. S. 891, results in a frustration of the joint regulatory program.

The better approach may be found in a recently decided district court case, *Lawson Milk Co.* v. *Benson*, Civil No. 34708 (D. Ohio, Aug. 18, 1960). Judge McNamee was confronted with a like compensatory payment provision contained in Order 75 (Cleveland, Ohio area). There, too, the partially regulated handler argued that exaction of a similarly computed compensatory payment was in violation of 608c(5)(A) and based his case upon the *Kass* v. *Brannan* decision. The court in rejecting this precedent, held that a compensatory payment is not a part of the minimum class price and thus not within the uniformity requirement. Judge McNamee concluded that he was not bound by *Kass*. He noted, however, that Judge Clary, who decided this case below, felt bound to follow the *Kass* holding.

POINT III

Partial regulation by way of Compensatory Payments is an election offered to Appellees in lieu of full regulation.

In establishing the boundaries of a regional milk marketing area, it is inevitable that the line set, literally speaking, will divide some outside handlers from a small segment of their market located within the order area. This will be true no matter where the line is drawn. The existence of these peripheral dealers creates a dilemma. If allowed to make Class I sales within the area without financial obligation to the pool, the fully regulated members will be deprived of fluid utilization with a resulting reduction in the blend price. The disruptive effect will increase proportionately with the amount of outside intervention. This kind of situation invites the dumping of surpluses. Thus, the alternative of nonregulation is not desirable.

Full regulation is another alternative. *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (C. A. 3). This method of regulation will assure the integrity of the market. It is, however, a costly solution for peripheral handlers with minimal sales within the area.

Compensatory payments are the middle ground. This method of control, generally termed partial regulation, gives these handlers a market outlet within the pool at much less cost than full regulation entails. This method is offered under Section 927.29(d) of the joint orders. The payment is calculated to reimburse producers under the orders for the loss of fluid sales and provides the partially regulated handler with a return in line with that available elsewhere for this milk. The handler is given the privilege of avoiding the more onerous financial obliga-

tions associated with full regulation by making a monthly election to be partially regulated. Thus, the compensatory payment is not a barrier erected to isolate the pool from outside supplies, but rather a "necessary and incidental" device offered to non-pool handlers to give them access at a cost which is equated to balance the equities between pool and non-pool producers.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

DAVID D. FURMAN,
Attorney General of New Jersey
Attorney for Floyd R. Hoffman, Director of the Office of Milk Industry, Department of Agriculture, State of New Jersey, Amicus Curiae.

WILLIAM L. BOYAN,
Deputy Attorney General,
Of Counsel.

November 1, 1961

[APPENDICES FOLLOW]

APPENDIX A

Memorandum of Agreement Between the United States Secretary of Agriculture and the Director of the Office of Milk Industry of the State of New Jersey for the Formulation and Administration of Rules and Orders for Milk for Marketing Areas in New Jersey

In order that the policies of cooperation embodied in Public Act No. 10, 73rd Congress, as amended and as reenacted by the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 601 *et seq.*) hereinafter referred to as the Federal Act and Section C.4:12A-25, Chapter 274 P.L. 1941, as amended by Chapter 447 P.L. 1948, as amended by Chapter 159 P.L. 1952, State of New Jersey, Department of Agriculture, Office of Milk Industry, hereinafter referred to as the State act may be effectuated in a practical way, the procedure outlined below is hereby adopted by the Secretary of Agriculture of the United States and the Director of the Office of Milk Industry, State of New Jersey as the framework within which the parties hereto will cooperate with each other in connection with milk orders applicable to the handling of milk in marketing areas located in the State of New Jersey.

I

The Secretary of Agriculture and the Director of the Office of Milk Industry shall work together in matters pertaining to the regulation, as provided in the Federal act, of the procurement of milk by handlers and milk dealers who market or in any manner participate in the procurement, processing, or distribution of milk produced to be marketed in such marketing area or areas as shall be defined in such order or orders. Such collaboration is deemed to include but is not limited to: preliminary investigation, arrangement for and conduct of public rule making proceedings in the manner, and to the extent permitted un-

der the Federal act, Rules and Regulations issued thereunder and the Administrative Procedure Act, appraisal of record evidence, consultation in an effort to reach agreement on all essential provisions supported by evidence in the record, prior to the issuance of any complementary or concurrent order or an amendment thereto.

II

In the event that complementary and concurrent Federal and State orders, rules or regulations prove to be feasible, the following standards or practices will be observed.

Uniform Provisions

The Secretary of Agriculture and the Director of the Office of Milk Industry shall, in their respective complementary and concurrent orders for marketing areas within the State of New Jersey, establish identical regulatory provisions to the extent authorized by the respective Federal and State acts. Notwithstanding the fact that the Director of the Office of Milk Industry may have authority under the state law to regulate milk or the handling thereof in ways other than is authorized by the above cited Federal statute, the state order herein described shall be limited to the same terms and conditions as may be included in the Federal Milk Order.

Administrative Agency

The Secretary of Agriculture will consult with the Director of the Office of Milk Industry prior to the designation of the agency to administer the Federal order and the Director of the Office of Milk Industry will utilize the same agency for the administration of the concurrent state order, which shall be a market administrator. Except as otherwise agreed to in writing between the parties here-

to, the duties of the market administrator shall be confined to the administration of the orders pursuant to which he has been designated and, while serving in such capacity, the market administrator and such personnel as may be employed by him shall not be utilized by either the Federal or State authorities during the period of employment, in the administration of any other orders not common to both authorities. All employees shall be under the exclusive direction of the market administrator and may be utilized to carry out any of his duties. Nothing in this arrangement shall be deemed to change the responsibility of the market administrator to the Secretary of Agriculture or to change the status of the market administrator or that of any of his employees as persons engaged in the administration of a Federal milk order or as affecting or modifying in any way such rights, duties or privileges as may exist by reason thereof. The Secretary of Agriculture and the Director of the Office of Milk Industry may also designate the same person as the market administrator of other complementary and concurrent orders.

Acquisition and Use of Information

In view of the use of a single agency to administer such complementary and concurrent orders and the impracticability or impossibility of identifying information that may be considered as having been received pursuant to one order as distinguished from the other all information received by such agency pursuant to such orders shall be considered as received under both orders insofar as the provisions of 7 U. S. C. 608d of the Federal Act and Section C.4:12A-25 of the State Act regarding the confidentiality of such information are applicable. Therefore, in accordance with the requirements of 7 U. S. C. 610(i) of the Federal Act, the Director of the Office of Milk Industry agrees that any and all information acquired from the common agency administering such orders will be kept

confidential by himself and by all persons associated with him who have access to or use it in the course of their official duties, in a manner similar to that required of Federal officers and employees under the provisions of 7 U. S. C. 608(d)(2).

Finances

Expenses incurred in the maintenance of the market administrator's office and in the exercise of his specified powers and duties shall be paid for from funds collected for this purpose pursuant to the respective complementary and concurrent orders applicable to the same marketing area. Disbursements from the funds so collected shall be at the direction of the market administrator, subject to supervision by the Secretary of Agriculture and to audit by both Federal and State authorities.

Administrative expenses shall constitute only those expenses incurred in the performance of the duties of the market administrator as set forth in the respective complementary and concurrent orders applicable to a given marketing area as distinguished from expenses incurred by the Federal or State governments in the administration of their respective statutes, or in the enforcement of such orders.

Administration

The market administrator designated under complementary and concurrent orders shall use a uniform system in securing periodical reports from handlers and milk dealers, in auditing and verifying the same and in making any and all necessary corrections or adjustments. The general policy of the cooperation shall be understood to extend to the interpretation or application of uniform or similar provisions. The books, records, and accounts of the market administrator shall be open for inspection and audit to the Secretary of Agriculture and the Director of the Office of Milk Industry.

Appendix A

Enforcement

The failure of any person to comply with any of the provisions of a complementary and concurrent order shall be regarded as of mutual concern, and the respective governmental authorities shall be kept fully advised in regard thereto.

In all matters affecting enforcement of their respective complementary and concurrent orders applicable to the same marketing area, the Secretary of Agriculture and the Director of the Office of Milk Industry will undertake to utilize all means at their disposal for the effective enforcement of such orders.

III

The failure of the Secretary of Agriculture and the Director of the Office of Milk Industry to agree with respect to any aspect of the regulatory programs which are the subject matter of this agreement shall not in any way restrict the parties hereto from independently exercising their respective authorities under the Federal Act or the State Act. In the event of the issuance of complementary or concurrent orders or amendments thereto, it is not intended that such issuances shall make the orders dependent in whole or in part upon each other for their validity or legal force and effect.

IV

This Memorandum of Agreement shall be operative and effective when signed by the Secretary of Agriculture and by the Director of the Office of Milk Industry and can be terminated on notice by either party.

Done at Washington, D. C., this 30th day of June 1955

/s/ Earl L. Butz, Assistant Secretary of Agriculture Done at Trenton, New Jersey, this day of May 31, 1955

/s/ Floyd R. Hoffman, Director, Office of the Milk Industry, State of New Jersey

APPENDIX B

Office of Milk Industry Notices

STATE OF NEW JERSEY
DEPARTMENT OF AGRICULTURE
OFFICE OF MILK INDUSTRY

NOTICE OF HEARING

In order to consider proposals by the United States Secretary of Agriculture to create a new and separate Federal marketing area under the Agriculture Marketing Agreement Act of 1937 (7 U.S.C. 601, et seq.), which would include northern New Jersey, and to consider specific proposals in respect to the terms of such an order should it be promulgated,

NOTICE IS HEREBY GIVEN that pursuant to P.L. 1941, c. 274, as amended (N.J.S.A. 4:12A-1, et seq.), the Office of Milk Industry will conduct a public hearing jointly and concurrently with the United States Department of Agriculture commencing Monday, June 18, 1956, at 10:00 A.M. in the Robert Treat Hotel, Park Place, Newark, New Jersey, for the purpose of receiving evidence concerning the proposals outlined above and relating to matters set forth in the Notice of Hearing of the United States Department of Agriculture, signed by Roy W. Lennartson, Deputy Administrator, Agriculture Marketing Service, on May 18, 1956, and published in the Federal Register (21 F.R. 3537), which terms, proposals and amendments are herein incorporated by reference.

Copies of this notice and of the notice of the United States Department of Agriculture, together with proposals and proposed amendments attached thereto, may be obtained from the Office of Milk Industry, Department of Agriculture, State of New Jersey, 1 West State Street, Trenton, New Jersey.

Floyd R. Hoffman
FLOYD R. HOFFMAN, Director
Office of Milk Industry

Dated: June 11, 1956

Appendix B

STATE OF NEW JERSEY
DEPARTMENT OF AGRICULTURE
OFFICE OF MILK INDUSTRY

SUPPLEMENTAL NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the Notice of Hearing issued by the Office of Milk Industry, Department of Agriculture, June 11, 1956, relating to the conduct of a public hearing jointly and concurrently with the United States Department of Agriculture to consider proposals by the United States Secretary of Agriculture to create a new and separate marketing area under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601, et seq.), which would include Northern New Jersey (21 F.R. 3527), is hereby amended to include as part of the hearing, consideration of whether, on the basis of the entire record, a single marketing agreement and order regulating the handling of milk for a marketing area consisting of all the territory in the States of New York and New Jersey for which regulation has been proposed in the original Notice of Hearing, should be issued and would better effectuate the purposes of the act than would two or more separate marketing agreements and orders for such territory.

Specific terms and proposals that will be considered in the hearing as outlined in this amended Notice are contained in the Supplemental Notice of Hearing of the United States Department of Agriculture signed by Roy W. Lenmartson, Deputy Administrator, Agricultural Marketing Service on February 26, 1957 and are, together with other supplemental Notices of Hearing issued by the United States Department of Agriculture (21 F.R. 3799, 21 F.R. 6680), incorporated herein by reference.

FLOYD R. HOFFMAN
Floyd R. Hoffman, Director
Office of Milk Industry

Dated: March 6, 1957

Appendix B

STATE OF NEW JERSEY
DEPARTMENT OF AGRICULTURE
OFFICE OF MILK INDUSTRY

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that pursuant to P.L. 1941, C.274, as amended (N.J.S.A. 4:12 A-1 et seq.), and particularly Section 25, the Office of Milk Industry will conduct a public hearing jointly and concurrently with the United States Department of Agriculture commencing at 10 A. M. on February 3, 1958 at the Utica Hotel, Utica, New York, and at 10 A.M. on February 5, 1958 at the Hotel Robert Treat, Newark, New Jersey, for the purpose of receiving evidence concerning the proposals outlined and relating to matters set forth in the Notice of Hearing of the United States Department of Agriculture (Doc. No. AO-71-A34), signed by Roy W. Lennartson, Deputy Administrator, Agricultural Marketing Service, on January 21, 1958 and supplemental notice thereto, signed January 24, 1958 by F. R. Burke, which terms, proposals and amendments are herein incorporated by reference.

Copies of this notice and of the notice of the United States Department of Agriculture, together with proposals and proposed amendments attached hereto, may be obtained from the Office of Milk Industry, Department of Agriculture, State of New Jersey, 1 West State Street, Trenton, New Jersey.

Floyd R. Hoffman
FLOYD R. HOFFMAN, Director
Office of Milk Industry

DATED: January 27, 1958

APPENDIX C

Pertinent Parts of Official Order 57.3

DEFINITIONS

* * *

Sec. 927.3 Marketing area. "New York-New Jersey milk marketing area" (hereinafter called the "marketing area") means all of the territory within the boundaries of the city of New York, and the counties and parts of counties set forth in paragraphs (a) and (b) of this section together with all piers, docks, and wharves connected therewith, and all craft moored thereat, and including territory within such boundaries which is occupied by Government (Municipal, State, Federal, or International) reservations, installations, institutions, or other establishments.

(*a*) The city of New York and counties of Nassau, Suffolk (except Fisher's Island), and Westchester in the State of New York (such territory being referred to hereinafter as the "New York metropolitan district").

(*b*) The following counties and parts of counties in the State of New York: Albany, Broome; Cayuga (except the townships of Sterling, Victory, Conquest, and Montezuma); Chemung; Chenanogo; Columbia; Cortland; Delaware; Dutchess; that part of Essex consisting of the townships of Schroon, Ticonderoga, Crown Point, and Moriah; Fulton (except the township of Stratford); Greene; Herkimer (except the townships of Webb, Ohio, and Salisbury); Madison; Montgomery; Oneida (except the townships of Ava, Boonville, Forestport, and Florence); Onondaga; Orange; Oswego (except the townships of Redfield and Boyiston); Otsego; Putnam; Rensselaer; Rockland; Saratoga (except the townships of Day, Edinburg, and Providence); Schenectady; Schoharie; Schulyer; that part of Steuben consisting of the townships of Addison, Corning,

and Erwin; Sullivan; Tioga; Tompkins; Ulster; Warren (except the townships of Johnsburg, Thurman, and Stony Creek); Washington; and Yates (except the townships of Italy, Middlesex, and Potter); and in the State of New Jersey: Bergen; Essex; Hudson; Hunterdon; Middlesex; Monmouth; Morris; Ocean (except the boroughs of Barnegat Light, Beach Haven, Harvey Cedars, Ship Bottom, Surf City, Tuckerton, and the townships of Eagleswood, Lacey, Little Egg Harbor, Long Beach, Ocean, Stafford, and Union); Passaic; Somerset; Sussex; Union; and Warren:

* * *

Sec. 927.5 Dairy farmer. "Dairy farmer" means any person who produces milk.

Sec. 927.6 Producer. "Producer" means any dairy farmer whose milk is delivered direct from farm to a pool plant: *Provided*, That a dairy farmer who, if not a producer pursuant to this order, would be defined as a producer under another order issued pursuant to the Act shall not be a producer under this order if the milk received from all such dairy farmers at the plant is assigned to Class III, or is subject to payments at the rates specified in Sec. 927.83 (b)(2), or is subject to payments at the rates specified in Sec. 927.83(b)(1) and the milk is priced at the lowest class price under the other order.

Sec. 927.7 Handler. "Handler" means (a) any person who engages in the the handling of milk or products therefrom, which milk was received at a pool plant, or a plant approved by any health authority as a source of milk for the marketing area, (b) any person who engages in the handling of milk, concentrated fluid milk, cultured or flavored milk drinks, cream, half and half, or skim milk, all or a portion of which is shipped to, or received in, the marketing area, or (c) any cooperative association of dairy

farmers with respect to any milk which it causes to be delivered from dairy farmers to a pool plant of any other handler for the account of such association and for which such association receives payment.

* * *

Sec. 927.29 Temporary pool plants. Except for plants which, pursuant to paragraph (a) of Sec. 927.27 or pursuant to the proviso of paragraph (c) or to paragraph (e) of this section, are not eligible for designation, any plant not designated pursuant to Sec. 927.25 or Sec. 927.28 shall automatically be designated a pool plant in accordance with provisions of paragraphs (a) through (d) of this section: *Provided*, That no plant shall be a pool plant pursuant to this section (1) in any month in which it is a pool plant pursuant to provisions of Federal Order No. 119, or (2) in any of the months of December through June if it was a pool plant pursuant to provisions of Federal Order No. 119 in each of the preceding months of July through November.

(*a*) For any of the months of January through March and July through December, any plant at which 25 percent or more of the receipts of milk from dairy farmers is classified in Class I-A on some basis other than the failure to account for such milk shall automatically be designated a pool plant for such month.

(*b*) For any of the months of April, May, or June, any plant at which during the preceding period of October, November, and December either (1) no milk was received from dairy farmers, or (2) 60 percent or more of the milk received from dairy farmers was classified in Class I-A on some basis other than the failure to account for such milk, shall automatically be designated a pool plant for any of

such months of April, May, or June in which 10 percent or more of the milk received from dairy farmers is classified in Class I-A on some basis other than the failure to account for such milk.

(*c*) Any plant which is a pool plant in any of the months of April, May, or June on the basis of paragraph (b) of this section shall be a pool plant in any of the months of July through March following in which 60 percent or more of the milk received at the plant from dairy farmers is classified in Class I-A and Class I-B: *Provided*, That upon written request presented to the market administrator by the handler, the plant shall not be a pool plant on any basis from the month following receipt of such request until the following July 1.

(*d*) Any plant which for any month is not a pool plant because of failure to meet the requirements of paragraphs (a), (b), or (c) of this section from which Class I-A milk is distributed in the marketing area other than to another plant shall be a pool plant in any month if at least 55 percent of the milk received from dairy farmers at the plant during such month is classified in Class I-A and Class I-B; *Provided*, That such plant shall not be a pool plant if the handler operating the plant elects at the time of filing the report pursuant to Sec. 927.50 not to have the plant designated a pool plant, and to make payments into the producer settlement fund at the rate specified in 927.83 (b) for any nonpool milk or skim milk which, on the basis of products distributed in the marketing area to purchasers other than other plants is classified as Class I-A, Class II, or as skim milk subject to the fluid skim differential: *Provided further*, That such plant shall not be a pool plant, if in the absence of this provision, milk received from farmers at the plant would be classified and

priced under another order issued pursuant to the Act, with a provision for market-wide equalization, and if the percentage of the milk received from dairy farmers at the plant which is classified as Class I-B and disposed of in the marketing area defined in such other order is greater than the percentage of such milk classified as Class I-A.

* * *

[NOTE: As in effect for the period prior to September 1, 1958 paragraph (d) reads as follows:]

(*d*) Any plant which for any month is not a pool plant because of failure to meet the requirements of paragraphs (a), (b), or (c) of this section (except a plant which is not a pool plant pursuant to the proviso in paragraph (c)), but from which Class I-A milk is distributed in the marketing area other than to another plant shall be a pool plant in any month at the option of the handler, exercised at the time of filing the report pursuant to Sec. 927.50, if at least 55 percent of the milk received from dairy farmers at the plant during such month is classified in Class I-A and Class I-B: *Provided*, That a plant at which, except for this paragraph, milk received from farmers would be classified and priced under another order issued pursuant to the Act, shall not be a pool plant pursuant to this paragraph unless the percentage of the milk received from dairy farmers at the plant which is classified in Class I-A is greater than the percentage of such milk which is classified in Class I-B and disposed of in the marketing area defined in such other order.

Sec. 927.83 Payments on milk received from dairy farmers at nonpool plants. Payments shall be made by handlers to producers, through the producer settlement fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d)

of this section: *Provided*, That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payments set forth in this section shall not be required.

(*a*) Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk, which milk or milk products meets each of the following conditions:

(*1*) It was derived from milk received at a nonpool plant from dairy farmers, from dairy farmers defined as producers pursuant to the provisions of Federal Order No. 119, or received from a handler designated as a producer-handler pursuant to Sec. 927.15.

(*2*) It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant outside the marketing area.

(*3*) The milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk would be subject to the fluid skim differential if it were derived from pool milk.

(*b*) The amounts of payment for the products set forth in paragraph (a) of this section shall be as follows:

(*1*) If the milk or the milk equivalent of the butterfat, or the skim milk is classified and paid for under another order issued pursuant to the Act, the amount of payment on such products, except skim milk, shall be any plus amount obtained by substracting the value of the milk or the milk equivalent of the butterfat at the class price or prices under such order from the value computed in ac-

cordance with the classification and pricing set forth in this subpart: *Provided*, That the payment shall be at the rates set forth in subparagraph (2) of this paragraph if the other order permits the deduction of such payment from the amount otherwise due for such milk pursuant to such other order: *Provided further*, That no payment shall be applicable to milk distributed on routes in the marketing area defined in this order from a plant which is a pool plant under provisions of Federal Order No. 119. The amount of payments on skim milk shall be an amount computed pursuant to Sec. 927.44 adjusted for the location of the plant, except that no payment shall be applicable to packaged skim milk classified and priced under provisions of Federal Order No. 119.

(2) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant in the 401-425 mile zone, or in some other zone nearer the marketing area, the handling of which is not regulated by an order issued pursuant to the Act or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payment, except as otherwise specified in subparagraph (4) of this paragraph, shall be the differences between its classified value at the Class I-A or the Class II price, depending upon its classification, and its value at the Class III price, such class prices to be adjusted for butterfat test and the location of the plant at which the nonpool milk was originally received from farmers: *Provided*, That for concentrated fluid milk, cream, half and half, fluid cream products, and cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent butterfat, the payment shall be computed on the milk equivalent thereof as so classified. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to Sec. 927.44 as similarly adjusted for location.

(*3*) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant farther from the marketing area than the 401-425 mile zone, the handling of which is not regulated by another order issued pursuant to the Act, or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payments shall be the difference between the value of its milk equivalent at the Class I-A or Class II price, depending upon its classification, and the value of such milk at the midwestern condensery price announced pursuant to Sec. 927.46 (b) (9), such class prices to be adjusted for the location of the plant at which the nonpool milk was originally received from dairy farmers: *Provided*, That for milk, fluid milk products, and cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, the payment shall be the difference between the value of such milk or milk product at the Class I-A price for milk containing 3.5 percent butterfat, adjusted for location of the plant, and the condensery price. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to Sec. 927.44 similarly adjusted for location.

(*4*) For any month in which the volume of milk subject to the butter-cheese adjustment used in the computation of the uniform price is more than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payment required by subparagraph (2) of this paragraph shall be increased by the value of the milk or milk equivalent at the rate of the butter-cheese adjustment at the plant where the milk was received from dairy farmers.

(*5*) In computing the milk equivalent value of milk or milk products as specified in this paragraph, such value

shall be computed on the basis of milk containing 3.5 percent of butterfat.

(*c*) Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph: *Provided*, That if the milk is received from a handler under another order issued pursuant to the act, which order provides that the payment to the producer settlement fund may be deducted from the handler's obligation under the other order, the payment shall be made by the handler subject to the other order regardless of the provisions of subparagraphs (1) through (3) of this paragraph:

(*1*) By the handler first receiving the milk or milk product at a pool plant outside the marketing area.

(*2*) By the handler operating the plant where the milk or milk product is first received in the marketing area if the milk or milk product is not received at a pool plant outside the marketing area.

(*3*) By the handler operating the plant from which the milk or milk product was moved into the marketing area if such milk or milk product is neither received at a pool plant outside the marketing area nor at a plant in the marketing area.

(*d*) The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to Sec. 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with Sec. 927.80.

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